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No.

IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

JANA L. MORTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that a job duty is not an "essential function" under the Americans with Disabilities Act of 1990 where the employer could in theory reassign that duty to other employees.

2. Whether the Ninth Circuit erred in invalidating a job qualification standard under the Americans with Disabilities Act of 1990 based on the court's adoption of the bona fide occupational qualification test rather than the traditional business necessity test that governs the validity of qualification standards in other circuits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below. Pursuant to Rule 29.6 of the Rules of this Court, petitioner United Parcel Service, Inc., an Ohio corporation, states that all of its stock is beneficially owned by United Parcel Service, Inc., a Delaware corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Parcel Service, Inc. ("UPS") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The published decision of the Ninth Circuit panel below (Reinhardt, Tashima, and Berzon, JJ.) creates not just one conflict, but two conflicts of authority among the federal circuit courts concerning the proper tests for determining the validity of an employer's adoption of essential functions and qualification standards under the Americans with Disabilities Act of 1990, as amended (the "ADA"), 42 U.S.C. §§ 12101-12213. The fundamental issue posed by this case, and by numerous other cases pending throughout the federal courts, is how to evaluate whether a job applicant with physical limitations is "qualified" for the job and thus covered by the ADA. Review is warranted to resolve the conflicts created or exacerbated by the decision below and to bring clarity to this important area of the law.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1a- 30a) is reported at 272 F.3d 1249. The opinion of the United States District Court for the District of Arizona granting UPS's motion for summary judgment (App., *infra*, 31a-40a) is not reported.

JURISDICTION

This case arises under the ADA, and the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on November 30, 2001. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the provisions of the ADA and the regulations promulgated thereunder involved in this case are set forth at App., *infra*, 41a-42a.

STATEMENT OF THE CASE

I. Statutory And Regulatory Background

The ADA prohibits certain forms of discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). Under the statute, an individual is "qualified" only if he or she can perform a job's "essential functions." 42 U.S.C. § 12111(8). According to the regulations promulgated by the Equal Employment Opportunity Commission (the "EEOC"), a job function may be essential for several reasons, including that "the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2).

The ADA expressly contemplates and permits the use of physical job qualification standards, even though such standards may have an adverse impact on individuals with disabilities. Under the ADA, a job qualification standard that screens out or tends to screen out individuals with disabilities is valid so long as the standard is "job-related for the position in question and . . . consistent with business necessity." 42 U.S.C. § 12112(b)(6).

II. Factual Background

Respondent began her employment with UPS in 1992 as a part-time warehouse worker in Phoenix, Arizona. Her duties included sorting packages as well as loading and unloading delivery vehicles. Respondent is severely hearing-impaired, rated as "profoundly deaf," although her hearing did not prevent her from performing well in her warehouse

job. UPS recognized respondent as "Employee of the Month" four times between 1992 and 1994. App., *infra*, 2a.

In February 1995, respondent applied for the full-time position of "package car driver." Package car drivers are subject to a collective bargaining agreement (the "CBA") comprising three related contracts between UPS and the Teamsters Union. Most packages delivered by UPS are carried by "package cars" (the familiar brown UPS delivery trucks) on fixed routes, and UPS assigns these routes to package car drivers pursuant to a seniority-based bidding process specified in the CBA. App., *infra*, 2a-3a, 35a.

To ensure full coverage of delivery routes, UPS employs more package car drivers than it has fixed routes. As a result, not every package car driver is assigned to a specific route. Pursuant to the CBA-prescribed seniority bidding process, package car drivers with greater seniority are able to obtain the desirable fixed routes, whereas less senior package car drivers must work as unassigned "swing" drivers until they accrue enough seniority to bid successfully on a fixed route. Swing drivers fill in for the more senior drivers assigned to fixed routes when those assigned drivers are absent because of illness, vacation, leave, or other reasons. App., *infra*, 3a-4a; C.A. Supp. Excerpts 0031-0032.

UPS employed approximately 313 package car drivers in the Phoenix area at the time respondent applied for the position. Approximately 80% of these drivers were assigned to fixed routes while 20% worked as swing drivers. App., *infra*, 4a.

More than 94% of the fixed routes at UPS's Phoenix facilities are served by package cars with a gross vehicle weight in excess of 10,000 pounds. The U.S. Department of Transportation (the "DOT") regulates such vehicles ("DOT vehicles"), requiring drivers of these vehicles to meet all requirements for DOT certification under 49 C.F.R. §§ 390.5, 391.41(b). Because unassigned package car delivery drivers

are required to be able to cover any route in their building, including routes served by DOT vehicles, UPS requires package car driver applicants to obtain DOT certification before they can be hired.[1] Respondent's deafness precludes her from obtaining the requisite certification. App., *infra*, 2a-4a.[2]

At the time respondent applied to be a package car driver, UPS operated 254 fixed routes in the Phoenix area. Of these routes, 240 were served by DOT vehicles, and the remaining routes were served by vehicles weighing 10,000 pounds or less ("non-DOT vehicles"). App., *infra*, 4a. The smallest package cars used by UPS on these routes were Ford

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[1] UPS's written job description for the package car driver position, which was in effect at the time respondent sought the position, provides, in pertinent part, that "[d]river applicants must meet all of the requirements as specified by the D.O.T." C.A. Excerpts 070. The driving assignments for unassigned package car drivers can and do change from day to day, and accordingly those employees must be able to drive package cars of all sizes. C.A. Supp. Excerpts 0060, 0067, 0070, 0073, 0076, 0079, 0175-0176.

[2] The DOT's hearing standard requires that individuals be able to hear at a specified level. C.A. Supp. Excerpts 0004-0010; 49 C.F.R. § 391.41(b)(11) (requiring that driver "[f]irst perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5-1951"). Individuals who cannot pass that standard may or may not be substantially limited in the major life activity of hearing, depending on their individual circumstances. *Cf. Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

P500s, which have a gross vehicle weight of 9,550 or 9,600 pounds. C.A. Supp. Excerpts 0055, 0058.[3]

The few fixed routes that use non-DOT vehicles are generally more rural and residential, involving more driving between deliveries and fewer packages per stop. These non-DOT vehicle routes are considered more desirable to package car drivers because of their location and lighter load and thus are generally held by only the most senior drivers. For example, during the more than four years between the time respondent applied to be a package car driver and the issuance of the district court's summary judgment ruling, UPS hired 96 new package car drivers in the Phoenix area. Of these new drivers, 30 eventually accrued sufficient seniority to bid successfully on a fixed route, but *none* was able to obtain a non-DOT vehicle route. App., *infra*, 4a.

The routes involving non-DOT vehicles were distributed among the five UPS facilities (known as "centers") in Phoenix, and the highest number of routes served by non-DOT vehicles in any one center was five. The most junior driver assigned to any of these routes had more than seven years' seniority as a driver at the time respondent sought a package car driver assignment. C.A. Supp. Excerpts 0066, 0069, 0072, 0075, 0078. Thus, the CBA-based seniority system precluded respondent from obtaining a package car driver position on a fixed route served by one of the few non-DOT vehicles.

UPS informed respondent that she could not be hired as a package car driver because her hearing impairment precluded her from obtaining DOT certification. Respondent then asked her supervisor whether she could be hired as a package car driver and permitted to drive only non-DOT ve-

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[3] Mid-size passenger cars, by contrast, weigh approximately 3,000 pounds. C.A. Supp. Excerpts 0109.

hicles. Consistent with the CBA-mandated seniority system and with UPS policy and practice requiring all unassigned package car drivers to be able to cover routes serviced by DOT vehicles, UPS denied this request. App., *infra*, 3a.

III. Proceedings In The District Court

Respondent filed suit against UPS in the United States District Court for the District of Arizona. Her complaint alleged that UPS's refusal to hire her as a package car driver because of her inability to obtain DOT certification violated the ADA and the Arizona Civil Rights Act. The parties filed cross-motions for summary judgment. On October 9, 1999, the district court ruled in favor of UPS. App., *infra*, 31a-40a.

The district court observed that if UPS provided respondent with the "accommodation" she sought – assignment exclusively to non-DOT vehicles – UPS would violate the seniority rights of other package car drivers under the CBA. Thus, assigning respondent to a non-DOT vehicle would not be a "reasonable" accommodation. App., *infra*, 34a-38a. The court held that respondent failed to meet her burden of demonstrating the existence of a "reasonable accommodation that would enable her to perform the essential functions of the package car driver position." *Id.* at 38a. The court granted UPS's motion and denied respondent's motion, noting that respondent's state-law claim failed for the same reasons as her ADA claim. *Id.* at 39a-40a.

IV. Proceedings In The Court Of Appeals

Respondent appealed the summary judgment ruling as to her ADA claim, though not as to her state-law claim. UPS defended the district court's decision primarily on two grounds: (1) respondent was not qualified for the position of package car driver because covering routes using DOT vehicles is an essential job function, and respondent admittedly could not perform that function with or without accommoda-

tion; and (2) UPS's policy requiring DOT certification for all package car drivers is a lawful safety-related qualification standard that is job-related for the position and consistent with business necessity, and respondent had failed to carry her burden under the traditional business necessity test of showing the feasibility of other less restrictive standards. The Ninth Circuit reversed. App., *infra*, 1a-30a.

A. Driving DOT Vehicles As An Essential Function

The Ninth Circuit's analysis of the essential function issue focused entirely on the question whether UPS would be able to provide full-time work for respondent by excusing her from the obligation to drive DOT vehicles – the principal role of unassigned package car drivers – and instead cobbling together a different job consisting mainly of secondary tasks that package car drivers occasionally perform. App., *infra*, 8a-14a. In particular, the court opined that at two of the five Phoenix area UPS centers, there appeared to be sufficient non-DOT vehicle swing driving work available that it might be possible to assign all of that work to a single employee and thereby keep that employee fully occupied. *Id.* at 10a.

The Ninth Circuit reasoned further that the record did not preclude "the availability of *a full-time non DOT-certified swing driver position*." App., *infra*, 11a (emphasis added). The court then concluded that "evidence showing that overflow work [*i.e.*, driving necessitated by fluctuations in package volume on a given route] is a component of the work performed by swing drivers would further support an inference that UPS *could* employ *a swing driver limited to driving non-DOT vehicles*." App., *infra*, 11a (emphases added).

The court also pointed to the availability of *non*-driving work, stating that package car drivers may sometimes per-

form other tasks when there is insufficient driving work.[4] App., *infra*, 11a. The court opined that "the prospect that because [respondent] is not DOT-certified UPS may have to assign her occasionally to perform warehouse work cannot establish her inability to perform the essential functions of the swing driver job." App., *infra*, 11a. The Ninth Circuit thus concluded that "controverted issues of fact" preclude summary judgment on the question whether respondent could perform the essential functions of the package car driver position. App., *infra*, 9a.

B. UPS's Safety-Related Qualification Standard

In the alternative, UPS argued below that regardless of whether driving DOT vehicles is an essential job function for the package car driver position, requiring DOT certification for all package car drivers is permissible under the "business necessity" rule. UPS contended that the DOT certification requirements encompass safety standards that may, consistent with the ADA, be applied to all of UPS's package car drivers. App., *infra*, 14a.

The Ninth Circuit first noted, but rejected, respondent's contention that the court should analyze UPS's standard solely by examining whether respondent "pose[s] a direct

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[4] Specifically, the CBA provides that a package car driver who has been laid off for more than one week may replace, or "bump," a part-time warehouse employee and temporarily assume that individual's warehouse duties until the need for package car drivers increases again. C.A. Supp. Excerpts 0047. Package car drivers, however, usually drive full-time. C.A. Excerpts 152. A different job at UPS, known as "air combination driver," may involve employees spending part of their shift driving and part of their shift working in the warehouse. Respondent, however, lacked sufficient seniority to qualify for one of those air combination driver positions. C.A. Supp. Excerpts 0033, 0049.

threat to the health or safety of other individuals in the workplace" under 42 U.S.C. § 12113(b). The court observed that this "direct threat" standard, adopted by the EEOC in its interpretive guidance, has been rejected by the Fifth Circuit. App., *infra*, 15a-19a.

The Ninth Circuit then addressed the traditional "business necessity" defense, which was developed in the context of Title VII litigation. Under that standard, where a qualification standard has a disparate impact on members of a protected class, the employer is liable for discrimination "unless it could show that the standard was a job-related 'business necessity.'" App., *infra*, 19a. Where the employer shows job-relatedness, "a plaintiff may still show that a less discriminatory alternative test would serve the employer's interest, and thereby defeat the attempt to invoke the defense." App., *infra*, 20a.

The Ninth Circuit proceeded, however, to reject the application of the traditional business necessity defense in ADA litigation: "[U]nder Title VII, the business necessity defense applies only where a facially neutral qualification standard disadvantages a protected group. Where, instead, there is disparate treatment based directly on a proscribed classification, only the more stringent bfoq [bona fide occupational qualification] defense is available." App., *infra*, 20a. Under the court's bona fide occupational qualification ("BFOQ") standard, an employer bears the burden of showing "either (1) that 'all or substantially all' individuals who cannot meet the employer's qualification cannot perform the job"; or "(2) it is either impossible or highly impractical to determine which employees who lack the qualification may be able to perform." App., *infra*, 21a (citation omitted).

The court acknowledged authority from the Fifth Circuit that "supports the conclusion that Congress intended to provide for a business necessity defense with regard to qualifications standards that focus directly on an individual's dis-

abling or potentially disabling condition." App., *infra*, 22a. The Ninth Circuit concluded, however, that three aspects of the ADA demonstrate a contrary congressional intent: (1) the apparent requirement that qualification standards be limited to the essential functions of a job; (2) the presence of an "undue hardship" defense through which an employer can attempt to show the difficulty inherent in a proposed accommodation; and (3) the purported mandate of reasonable accommodation with respect to administering the standard itself. *Id.* at 23a-26a.

The court concluded its analysis by noting that "[i]f a transportation employer can demonstrate neither that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger nor that it is highly impractical more discretely to determine which disabled employees present such an unacceptable risk" – *i.e.*, if the employer cannot satisfy the BFOQ test – then "we would not think that the safety criterion would provide an accurate measure of actual ability." App., *infra*, 25a-26a. Applying this BFOQ test to UPS's use of the DOT requirements, the Ninth Circuit held that UPS had failed to carry its stringent burden. *Id.* at 26a-30a.

REASONS FOR GRANTING THE WRIT

The first question presented concerns the proper methodology for identifying the "essential functions" of a job. Under the Ninth Circuit's view, a job task is not an "essential function" if it could be reassigned to co-workers. The First, Seventh, and Tenth Circuits disagree, holding that a task does not become nonessential merely because it could be reassigned, and that the ADA does not permit courts to fashion new hybrid jobs in order to provide work for disabled applicants. This issue cuts to the very heart of the ADA because it determines the extent to which the ADA will become a vehicle for the judicial reengineering of the American workplace in ways never intended by Congress. The ADA requires rea-

sonable accommodations that enable disabled individuals to perform essential job functions – it cannot and should not be twisted into a vehicle for requiring employers to change the core requirements of a job.

The second question presented involves the selection of the governing test for determining the validity of job qualification standards challenged as discriminatory under the ADA. The Fifth, Eighth, and Tenth Circuits analyze qualification standards under the traditional "business necessity" test borrowed from cases arising under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (the "ADEA"), as specified in the text of the ADA itself. The Ninth Circuit, however, has rejected that standard in favor of a significantly more stringent "bona fide occupational qualification" test derived from the text of Title VII and the ADEA. The EEOC has suggested yet a third standard, contending that all safety-related qualification standards must be analyzed under the ADA's "direct threat" provision, which provides that an individual cannot be denied a job unless he or she poses a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

The Ninth Circuit's decision exacerbates the existing uncertainty regarding the proper test for judging the validity of qualification standards under the ADA, and it virtually eviscerates the concept of an essential job function as expressed in the statute itself and as further defined in other circuits and the EEOC's regulations. The ruling below presents employers with the Hobson's choice of jeopardizing public safety, by allowing unqualified and potentially dangerous employees to occupy safety-sensitive positions, or facing potential liability under the ADA. Congress did not authorize or intend such a result, and employers and employees alike need the Court's guidance concerning these important and recurring issues.

I. This Court Should Grant Certiorari To Resolve The *Division Of* Authority Over The Proper Test For Determining Whether A Job Function Is "Essential" Under The ADA

A. The Courts Of Appeals Are In Conflict Over Whether The Possibility Of Reassigning A Task To Other Employees Renders That Task Non-Essential

The courts of appeals have decided numerous cases in which the plaintiff argues that a particular job function is not "essential" within the meaning of the ADA because the task could be assigned to other employees as a "reasonable accommodation." The Ninth Circuit below held that the possibility of reassigning a function to other employees renders that function non-essential. The First, Seventh, and Tenth Circuits have reached precisely the opposite conclusion, holding that the possibility of reassigning functions to a co-worker does not render those functions non-essential.

1. The Ninth Circuit's View

According to the Ninth Circuit, if UPS could have created a new "non DOT-certified swing driver position" and kept respondent fully occupied in that newly-fashioned position, then UPS was required to do so. App., *infra*, 11a. The court's analysis of the essential functions issue focused on whether it would be "possible to keep a swing driver fully occupied with driving assignments if she were precluded from driving DOT vehicles." App., *infra*, 10a. The court held that there was a material factual dispute on that question, opining that "[t]he evidence tends to show that a swing driver operating only non-DOT vehicles would be occupied full-time servicing the assigned routes using non-DOT vehicles." *Id.* Moreover, the court held that "[respondent]'s evidence showing that overflow work is a component of the work performed by swing drivers would further support an

inference that UPS *could* employ *a swing driver limited to driving non-DOT vehicles*." App., *infra*, 11a (emphases added). Thus, the Ninth Circuit predicated its essential functions ruling entirely on its perception that UPS *could* create a new "non DOT-certified swing driver position" for respondent and keep her occupied with a range of tasks that constitute secondary duties of the existing package car driver position.

2. The Majority View

In stark contrast to the approach taken by the Ninth Circuit below, numerous courts of appeals have expressly rejected the contention that the possibility of reassignment renders a particular job function non-essential. In *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001), for example, a pharmacy employee suffered multiple injuries that precluded him from, among other things, lifting more than ten pounds or delivering medicine. The employee requested a modification of his duties to eliminate the need to lift or to deliver medicines. The pharmacy declined that request. Affirming summary judgment for the employer, the Seventh Circuit rejected the plaintiff's argument that "delivery is not an essential function of the . . . position because there are other ways to deliver medication, namely that other hospital employees deliver the medication." *Id.* at 929. The court observed that "[i]t is possible that *any* function, whether or not essential, could be assigned to additional employees. *The mere fact that others could do [plaintiff's] work does not show that the work is nonessential.*" *Id.* (emphases added). *See also Emerson v. Northern States Power Co.*, 256 F.3d 506, 513 (7th Cir. 2001) ("Emerson suggests that the calls could have been routed to another consultant, but this does not change their essential function status.").

The Tenth Circuit has reached the same conclusion. In *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001), the plaintiff, an investigator with the Kansas Department of Cor-

rections, developed multiple sclerosis, which precluded any running, carrying a firearm, or violent activity. Rejecting the plaintiff's request that his job be restructured so as not to require such activities, the employer terminated him, and the plaintiff sued under the ADA. The plaintiff argued on appeal that "certain activities he is unable to perform could be assigned to Mr. Perrin [a co-worker], other investigators who work for the state, or the many other 'law enforcement officers who could be called to make arrests or act as backup.'" *Id.* at 1260. The Tenth Circuit rejected that argument, reasoning that "[e]ven if we assume certain duties could be assigned to Mr. Perrin or state law enforcement officers, '[t]he mere fact that others could do [plaintiff's] work does not show that the work is nonessential.'" *Id.* (citation omitted).

The First Circuit has also adopted this approach. In *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), the plaintiff was a nurse who was unable to lift the required fifty pounds because of a back injury. As a temporary accommodation, the employer permitted her to obtain assistance from other employees with respect to lifting. The employer ultimately terminated the plaintiff, who sued under the ADA, contending that lifting was not an essential function because other employees could be assigned that work. The court rejected that contention, holding that the possibility of reassigning that work to other employees "merely shows the job could be restructured, not that [the function] was nonessential." *Id.* at 26 (citation omitted).

In addition to this stark conflict with the decisions of the First, Seventh, and Tenth Circuits, the rule adopted by the court below is also inconsistent with decisions from several courts of appeals holding that employers are not required to excuse employees from performing essential functions as a "reasonable accommodation" under the ADA. These decisions necessarily reject the proposition, adopted by the court below, that the employer's *ability* to reassign a function to

another employee establishes the non-essential nature of the function. *See, e.g., Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 20 (1st Cir. 1998) ("[T]he ADA does not require an employer 'to reallocate job duties in order to change the essential function of a job.'" (citations omitted)); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999) ("The ADA does not require an employer to relieve an employee of any essential functions of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so."); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 632 (6th Cir. 1999) ("Courts have continuously found that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability."); *Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001) ("Toro was not required . . . to reallocate the essential functions of Heaser's job that she could not do – that is, work with orders on carbonless paper.").[5]

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[5] The Ninth Circuit's decision in this case is also at odds with numerous cases in which courts have upheld shift or duty rotation as an essential function. *See, e.g., Champagne v. Servistar Corp.*, 138 F.3d 7, 14 (1st Cir. 1998) (ability to rotate through various truck delivery routes was essential job function); *Laurin v. Providence Hosp.*, 150 F.3d 52, 59 (1st Cir. 1998) (plaintiff's argument that shift rotation is not an essential function is "tantamount to maintaining that night work is not an 'essential function' of a night watchman's job"); *Malabarba v. Chicago Trib. Co.*, 149 F.3d 690, 698 (7th Cir. 1998) (plaintiff not qualified because unable to perform all essential functions of job, even though he arguably could perform some of those functions). These cases uphold the right of employers to require employees to perform multiple different job functions, notwithstanding an ADA plaintiff's showing that he or she could perform *some* of those functions and that the remainder could be reassigned elsewhere.

B. The Ninth Circuit's Decision Conflicts With The ADA And The EEOC's Implementing Regulations

In the employment context, the ADA's protections extend only to those disabled individuals who are "qualified" for a job. The statute defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The "qualified individual" inquiry thus focuses on (1) identifying the "essential functions" of a job; and (2) determining whether an individual can, with or without reasonable accommodation, perform those essential functions.

Congress expressly provided that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). As the EEOC has recognized, "[t]he ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it." EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* at II-18 (1992). *See, e.g.*, *Basith*, 241 F.3d at 928 ("'[a]lthough we look to see if the employer actually requires all employees in a particular position to perform the allegedly essential functions, we do not otherwise second-guess the employer's judgment in describing the essential requirements for the job'"); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995) (same); *see also Frazier*, 254 F.3d at 1260 (rejecting plaintiff's request to transform job into administrative assistance role where "the record unequivocally demonstrates

[plaintiff's] job was not created for the limited purpose of providing administrative assistance"). Thus, the ADA contemplates a high degree of deference to an employer's determination of essential functions. The Ninth Circuit, however, all but ignored UPS's views regarding the essential functions of the package car driver position.

Moreover, the EEOC has issued regulations clarifying the concept of "essential functions." According to the EEOC, "[a] job function may be considered essential for any of several reasons," including that "the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2). To aid courts in determining whether a job function is essential, the EEOC has set forth seven non-exclusive factors to be considered:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
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> (iii) The amount of time spent on the job performing the function;
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> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3). Not surprisingly, the first two factors are the considerations mentioned in the text of the ADA itself.

The clear import of the ADA and its regulations is that the employer's assessment of essential job functions, particularly where supported by written job descriptions that predate the challenged employment decision, should be given great weight by the courts. Where the other factors listed by the EEOC do not weigh heavily against a finding that a job function is essential, the employer's views and pre-existing written policies should be dispositive. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1177 (10th Cir. 1999) ("[W]e will not second-guess the employer's judgment.").

The Ninth Circuit did not even consider, much less apply, the seven factors specified in the EEOC's regulations. The court gave no weight whatsoever to UPS's determination, as reflected in the written job description, of the primary need for package car drivers to be able to cover routes served by DOT vehicles. Nor did the court discuss the other relevant factors set forth in the regulations. Instead, the court focused solely on whether a completely new hybrid position could be manufactured by combining secondary duties such as warehouse work and exclusively non-DOT driving so as to provide a sufficient amount of work to occupy an employee full-time in this new position.

The Ninth Circuit's decision to ignore the text of the ADA, the EEOC's regulations and the law of several other circuits has substantial outcome-determinative effects. In this case, for example, UPS has long required new package car drivers to meet the DOT's certification standards, and UPS memorialized that requirement in its written job description well before respondent sought the position. The very reason UPS hires swing drivers is so that there will be sufficient qualified drivers available to fill in for absent drivers of greater seniority who are assigned to fixed routes. UPS has long required all swing drivers to be capable of filling in for any absent driver, and more than 94% of the fixed routes in the Phoenix area are served by DOT vehicles. In other

words, the primary role of the package car driver is to drive package cars, and pursuant to the CBA the job of the swing drivers (and the reason the position exists) is to cover for absent senior assigned drivers, the vast majority of whom drive DOT vehicles. Thus, there is nothing suspect or improper about UPS's policy of requiring all new package car drivers to be able to drive DOT vehicles. Under these circumstances, applying the EEOC's regulations and the case law of numerous other circuits, respondent is not qualified for the position of package car driver, and the ADA plainly requires that summary judgment be entered in favor of UPS. Any other result would require a reading of the ADA that allows individuals to obtain relief even when they cannot "perform the essential functions of the employment position." *See* 42 U.S.C. § 12111(8).[6]

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[6] The Ninth Circuit also announced that the burden of proving the availability of a reasonable accommodation shifts to the employer when there has been no interactive process between employer and employee to determine possible accommodations. "The question whether this failure [to engage in an interactive process] should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, should bear the burden of persuasion throughout the litigation." App., *infra*, 12a. This approach conflicts with the law of several other circuits. *See Frazier v. Simmons*, 254 F.3d 1247, 1263 (10th Cir. 2001) ("[E]ven if we assume a breakdown in the interactive process occurred, we hold Mr. Frazier did not 'show that a reasonable accommodation was possible . . . .'"); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996) ("American's failure to investigate did not relieve Moses of his burden of producing probative evidence that reasonable accommodations were available."); *see also Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) ("To establish that an employer failed to participate in an interactive process, a disabled employee must show: . . . the employee could

C. The Question Presented Is Important, Substantial, And Recurring

The question whether the mere possibility of reassignment renders a job function non-essential is of central importance in ADA cases, because it goes to the very heart of how courts are to decide what job functions are essential – an inquiry that in turn determines whether individuals are "qualified" for the job at issue. The division of authority discussed here is not a mere semantic quibble, but reflects a fundamental disagreement about the nature of the "essential functions" inquiry and about the extent (if any) to which courts will respect employers' judgments about the most efficient and effective way to allocate job responsibilities in the workplace.

Every day, employers across the country must determine whether the law requires them to provide accommodations to their employees. Both employers and employees need clarification of their respective rights and obligations under the ADA, and perhaps the most important unresolved threshold question under that statute is the proper test for identifying essential job functions. As shown above, the courts of appeals have taken diametrically opposed views on that issue. The resolution of this issue will affect the degree to which employers may establish the duties of particular jobs, as well as whether the courts will become industrial engineers, continually revising job descriptions to fit the disparate abilities of claimants who cannot perform the tasks that an employer has reasonably deemed necessary for a job.

The Ninth Circuit's decision leads to patently absurd results. In that court's view, an employer seeking to hire a driver to spend ninety-four percent of the work day driving and six percent of the work day performing miscellaneous

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have been reasonably accommodated but for the employer's lack of good faith.").

non-essential tasks would be required to hire an applicant who cannot drive under any circumstances but who can perform the non-essential tasks. Nothing in the ADA requires that approach, and employers in the nation's largest and most populous federal circuit should not continue to be subjected to this erroneous, burdensome, and disruptive rule of law. Given the important and recurring nature of the problem, as well as the conflicting and confusing rulings by the lower courts on this issue, this Court should grant certiorari in this case.

II. This Court Should Grant Certiorari To Clarify That Job Qualification Standards Are Evaluated Under The Traditional Business Necessity Test

A. The Lower Courts Are In Conflict Regarding Whether To Apply The Business Necessity Test Or The BFOQ Standard To Evaluate Job Qualification Standards

The Ninth Circuit below adopted the "bona fide occupational qualification" standard to govern the validity of physical qualification standards like the DOT hearing standard used by UPS in this case. The Fifth, Eighth, and Tenth Circuits, however, assess qualification standards under the traditional "business necessity" test, which "is more lenient for the employer than the statutory BFOQ defense." *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991). And further compounding the division of authority on this issue, the EEOC would apply yet a third test in this context: the statutory "direct threat" analysis.

1. The Ninth Circuit's View

The Ninth Circuit below held that the BFOQ standard governs the validity of a qualification standard that has the effect of excluding individuals with disabilities. The court observed that "[i]t is the bfoq defense that has ordinarily been

invoked when job-related safety requirements distinguishing among members of protected classes are at stake." App., *infra*, 20a. Based on that observation, the court expressed the view that "Congress must have intended to permit across-the-board exclusion of employees based upon disability-related safety criterion only on a showing somewhat similar to the one used for safety qualifications under the Title VII and the ADEA bfoq standard." App., *infra*, 22a. Accordingly, the Ninth Circuit held that "[a]n employer attempting through the business necessity defense 'to excuse a generally discriminatory provision' . . . must make a convincing showing both in demonstrating the correlation between the qualification standard and safe job performance and in proving the difficulty of using less restrictive alternatives." App., *infra*, 24a. The court thus required UPS to demonstrate either "that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger" or "that it is highly impractical more discretely to determine which disabled employees present such an unacceptable risk," which the court acknowledged represented "the Title VII/ADEA bfoq" standard. App., *infra*, 26a.

2. The Majority View

In contrast to the Ninth Circuit's adoption of the stringent BFOQ test for judging the validity of a physical qualification standard under the ADA, other courts of appeals have held that such standards are to be judged under the traditional business necessity test. For example, in *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946 (8th Cir. 1999), the plaintiff, an applicant for a position involving climbing ladders, had insufficient leg strength to be able to pass the employer's fitness standard and was denied the job. The plaintiff sued under the ADA, relying on case law under the ADEA to argue that the employer's standard, which tended to exclude employees with disabilities, constituted "disparate treatment" and thus that the business necessity test was inapplicable.

The Eighth Circuit squarely rejected that argument: "We believe that as long as the theory behind the lack of accommodation is conceivably job-related, as claimed, then the employer should be entitled to raise the business necessity rule." *Id.* at 951.

Similarly, in *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), the plaintiff challenged Exxon's rule permanently removing from certain safety-sensitive positions any employee who has undergone treatment for substance abuse. The EEOC challenged that rule, and the district court held that the business necessity defense was not available. *Id.* at 872. The Fifth Circuit reversed, explaining that "[i]n cases where an employer has developed a general safety requirement for a position, safety is a qualification standard no different from other requirements defended under the ADA's business necessity provision." *Id.* at 874. Accordingly, the court held that where "an employer has developed a standard applicable to all employees of a given class," the employer "may defend the standard as a business necessity." *Id.* at 875.

The Tenth Circuit reached the same conclusion in *Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001). In *Tate*, an employee responsible for driving vehicles containing hazardous materials began taking medication to control a seizure disorder. The employer, which had chosen to adhere to voluntary government standards precluding individuals with seizure disorders from driving, terminated the employee, who then sued under the ADA. *Id.* at 990. The court applied the business necessity test in rejecting the employee's claim: "Provided that any necessary job specification is job-related, uniformly-enforced, and consistent with business necessity, the employer has the right to establish what a job is and what is required to perform it." *Id.* at 993.

3. The EEOC's View

The EEOC has adopted yet a third approach to evaluating safety-related job qualification standards. According to the EEOC, safety-related qualification standards must be analyzed according to whether an individual "pose[s] a direct threat to the health or safety of other individuals in the workplace" under 42 U.S.C. § 12113(b). *See* 29 C.F.R. pt. 1630, App. § 1630.15(b)-(c) (requiring showing of direct threat for safety-related job qualification standards). Two courts of appeals have expressly rejected the EEOC's position. *See Exxon*, 203 F.3d at 875; App., *infra*, 16a-19a. Although this Court has yet to decide the matter, it has expressed doubt regarding the soundness of the EEOC's approach. *See Albertson's*, 527 U.S. at 569 n.15. Nonetheless, the EEOC continues to adhere to this counterintuitive interpretation of the ADA. Because this case involves a safety-related qualification standard, it presents an opportunity for this Court to correct both the EEOC's and the Ninth Circuit's erroneous interpretations of the ADA and to resolve the existing three-way split in the authorities regarding the proper test for judging the validity of such standards.

B. The Ninth Circuit's Approach Conflicts With The ADA, Which Incorporates The Business Necessity Test From Title VII And The ADEA

Congress enacted the ADA against a backdrop of substantial case law applying the business necessity and BFOQ standards, depending on the type of alleged discrimination at issue. Traditionally, employers may defend Title VII and ADEA disparate impact claims by showing "business necessity," which examines "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The employee retains the ultimate burden of persuasion under this approach. *Id.* "If the employer proves that the challenged requirements are job-related, the

plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest[s] . . . .'" *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

On the other hand, disparate treatment claims under Title VII and the ADEA are subject only to the statutory defense that consideration of the protected status "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (Title VII defense applicable to standards based on religion, sex, or national origin). *See also* 29 U.S.C. § 623(f)(1) (same language for ADEA). The BFOQ standard "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Dothard*, 433 U.S. at 333. Under the BFOQ standard, the employer bears the burden of establishing either (1) "a substantial basis for believing that all or nearly all employees" subject to the standard "lack the qualifications required for the position"; or (2) that "it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985).

In enacting the ADA, Congress chose to codify the business necessity defense, forbidding employers from "using qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard . . . is shown to be job-related for the position in question and is consistent with *business necessity*." 42 U.S.C. § 12112(b)(6) (emphases added). Thus, Congress directed courts to employ the "business necessity" standard, rather than the BFOQ test, in evaluating the validity of qualification standards that adversely affect individuals with disabilities.

"When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989). *See also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) (same). Because the concepts of "business necessity" and the BFOQ standard were familiar to Congress when it enacted the ADA, it must be presumed that Congress intended that qualification standards challenged as discriminatory be subject to the more lenient business necessity defense. In light of this clear statutory language and legislative intent, the Ninth Circuit's strained efforts to find a congressional purpose to adopt the BFOQ standard (App., *infra*, 22a-26a) fail completely.

The Ninth Circuit's error is attributable to its failure to recognize the essential difference between typical Title VII or ADEA claims and ADA claims. Title VII and the ADEA are, by their very nature, designed to protect broad classes of individuals against class-based discrimination, and there is seldom any difficulty in determining who falls within a protected class under those statutes. The ADA, by contrast, is inherently individualistic in focus. *See, e.g., Albertson's*, 527 U.S. at 566 (emphasizing "the statutory obligation to determine the existence of disabilities on a case-by-case basis"). Determining who is disabled for purposes of the ADA generally requires a fact-specific inquiry into the nature of an individual's impairments, mitigating measures, and any adaptation by the individual to compensate for the impairment. *See id.*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483-84 (1999). Whereas there will rarely, if ever, be a legitimate reason to exclude an individual from a job because of race, sex, religion, or age, and thus any standard that classifies individuals on those bases is immediately suspect, the same cannot be said of standards, particularly safety standards, that exclude employees based on the inability to meet certain

physical standards, even if that inability is attributable to an impairment that qualifies as a disability. Denying an applicant a package car driver position because of her national origin or religion gives rise to a compelling inference of animus and unlawful discrimination on the part of the employer, but declining to hire a *profoundly deaf* individual for that same job simply does not raise similar concerns. Accordingly, Congress's decision to adopt the business necessity test, rather than the BFOQ standard, to govern ADA challenges to qualification standards was entirely logical and consistent with the nature and purpose of the ADA, and the Ninth Circuit's contrary conclusion cannot withstand scrutiny.

C. The Question Presented Is Important, Substantial, And Recurring

The circuits disagree fundamentally – and the EEOC disagrees with the circuits – regarding how to assess the lawfulness of job qualification standards. Most courts defer to the employer and will uphold a standard so long as it is, in fact, job-related and consistent with business necessity. Notwithstanding the clear statutory support for that test, however, the Ninth Circuit imposes the considerably more stringent BFOQ test if the standard operates to exclude persons with disabilities. The EEOC rejects both the business necessity test and the BFOQ test and, instead, examines whether the employee poses a direct threat to others.

A broad range of safety-sensitive jobs, including law enforcement personnel, firefighters, commercial drivers, airline pilots, and many others are subject to physical qualification standards relating to matters such as strength, speed, endurance, manual dexterity, and sensory acuity. Many other jobs have physical qualification requirements with respect to such tasks as lifting, climbing, or standing. Such standards benefit employers, employees, and the public alike by ensuring that individuals selected for these positions will be able to per-

form their jobs safely and effectively without undue risk of physical harm to themselves, their co-workers, or the public.

Here, UPS had already employed respondent for years in a non-driving capacity and had recognized her several times as employee of the month, thus negating any inference that UPS disfavors hearing-impaired employees. UPS, like other employers, simply does not want impaired employees who pose obvious and undeniable safety risks to the public to be placed in a position where those risks may materialize. The DOT has already concluded that drivers who cannot hear at a certain level pose an unacceptable risk to public safety when driving vehicles only slightly larger than the non-DOT vehicles respondent sought to drive. The DOT standard indisputably applies to the vast majority of package cars, and UPS reasonably applied that standard to all package car drivers regardless of whether their vehicles happen to be slightly above or slightly below the 10,000 pound DOT regulatory threshold. As even the Ninth Circuit was forced to acknowledge below, "physical impairments may correlate more readily with safety risks than surrogates for such impairments, such as age." App., *infra*, 22a-23a.

Under the Ninth Circuit's BFOQ rule, employers will never be able to adopt standards, including safety standards, beyond whatever minimum governmental requirements happen to be in effect, unless the employers first conduct expensive and time-consuming research that may take years to generate meaningful standards. Here, by virtue of its adoption of the unduly stringent BFOQ test, the Ninth Circuit has ruled that UPS cannot require that an employee driving a 9,600-pound vehicle be able to hear as well as employees who drive vehicles weighing 10,001 pounds. The Ninth Circuit's errant view would require the elimination of nearly all employer-imposed safety standards, making it all but impossible for employers to take effective measures to protect the public's safety. This result is nonsensical, and it is contrary

to the purpose of the ADA. *See, e.g., Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.) ("While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public."), *cert. denied*, 531 U.S. 959 (2000); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974) ("Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."); *see also Albertson's*, 527 U.S. at 573 ("safe operation of commercial motor vehicles" is an "area [in which] the risks involved are so well known and so serious as to dictate the utmost caution") (citation omitted).

This issue is important, it affects employers and employees throughout the country every day, and the decision of the Ninth Circuit below has injected substantial confusion into the law. This Court's review is essential to reestablish the ability of employers to adopt and to enforce physical qualification standards, particularly in cases like this one involving safety-sensitive positions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 27, 2002

APPENDIX

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANA L. MORTON Plaintiff-Appellant, v. UNITED PARCEL SERVICE, INC., Defendant-Appellee.	No. 99-17447 D.C. No. CV-96-02813-JWS

Appeal from the United States District Court
for the District of Arizona
John W. Sedwick, District Judge, Presiding

Argued and Submitted
April 9, 2001 – San Francisco, California

Filed November 30, 2001

Before: Stephen Reinhardt, A. Wallace Tashima and
Marsha S. Berzon, Circuit Judges

Opinion by Judge Berzon

COUNSEL

Marc P. Charmatz, National Association of the Deaf Law Center, Silver Spring Maryland, for the plaintiff-appellant.

Patricia S. Radez, Gibson, Dunn & Crutcher LLP, San Francisco, California, for the defendant-appellee.

OPINION

BERZON, Circuit Judge:

Jana Morton appeals from the district court's order granting summary judgment for defendant-appellee United Parcel Service ("UPS") on her claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. We reverse.

I. Background

Morton was employed in Phoenix by UPS from 1992 until her resignation in June 1996. She was initially employed as a part-time warehouse worker, with duties including sorting packages and loading and unloading vehicles. Morton was honored by UPS as "Employee of the Month" on four separate occasions between 1992 and 1994. In February 1995, she applied for the position of "package car driver," a full-time position which is the primary route to advancement at UPS.

The Department of Transportation ("DOT") regulates vehicles with a gross vehicle weight rating in excess of 10,000 pounds. Professional drivers who drive such vehicles are required by federal law to be certified by DOT. 49 C.F.R. §§ 390.5, 391.41(b). UPS has a policy of hiring for driving positions only individuals who have obtained DOT certification.

Morton is severely hearing impaired, which precludes her from obtaining DOT certification.[1] Thus, although she

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[1] Morton is not completely deaf. She was, however, rated as "profoundly deaf" in a hearing test administered in conjunction with her application for a driving position. Morton, who uses two

[Footnote continued on next page]

successfully passed UPS's driving and written tests – two of the three prerequisites for promotion to package car driver – she was denied the promotion because she was unable to meet the physical requirements to obtain DOT certification.[2] When Morton was informed that she would not be hired as a driver because of her hearing impairment, she asked her supervisor if she could be hired and permitted to drive only non-DOT vehicles (those with gross vehicle weight under 10,001 pounds). Consistent with UPS's policy, this request was refused.

Most packages delivered by UPS are carried by drivers on fixed routes, assigned pursuant to a seniority-based bidding process under the terms of UPS's collective bargaining agreement with the Teamsters Union. All of UPS's drivers hold the title of package car driver, although the duties of package car drivers vary based on seniority. The collective bargaining agreement covering drivers provides that when a new route is created, it will be posted for bidding and assigned to the most senior package car driver who bids for it. The least senior drivers work as unassigned, or "swing",

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[Footnote continued from previous page]
hearing aids, testified that she can hear car horns and spoken voices, although she cannot make out specific words in conversation without the assistance of lip reading. Over a period of 15 years, Morton has regularly driven outside of work vehicles similar to the non-DOT trucks and vans used by UPS.

[2] Although UPS refuses to hire new drivers who are not DOT-certified, there is evidence that the company has accommodated individuals who became disabled (and ineligible for DOT certification) while already employed as drivers, by restructuring their routes so that they could make deliveries using non-DOT vehicles.

drivers until they accrue enough seniority to bid successfully on a fixed route.

UPS operates five geographic "centers" in Phoenix, each of which maintains a separate seniority list for full-time drivers. The swing drivers in a particular geographic center fill in on that center's assigned routes when the drivers assigned to those routes are on vacation or otherwise absent. In addition, the record indicates that package loads on fixed routes vary from day to day and that swing drivers handle overflow work. There is also evidence that on days when there is insufficient driving work to occupy all of the swing drivers, UPS assigns them to non-driving work, such as warehouse work.

At the relevant time, UPS operated 254 fixed routes in the Phoenix area, of which approximately 5.5% (14 routes) were served by non-DOT vehicles. During this same time period, UPS employed approximately 313 package car drivers in the Phoenix area, of whom roughly 80% drove on fixed routes while 20% worked as swing drivers. According to the record, the routes that use the smaller vehicles are generally the more rural and residential routes, requiring more driving between deliveries and typically featuring smaller packages and fewer packages at each stop. The non-DOT vehicle routes are considered more desirable by drivers because of their location and lighter load and are thus generally held by the more senior drivers. Of the 96 drivers hired in Phoenix since February 1995, 30 have successfully bid on assigned routes, but none has successfully bid on one of the 14 routes delivered with non-DOT vehicles.

Although only 14 fixed routes were served by non-DOT vehicles during the relevant time period, UPS operated approximately 33 non-DOT vehicles in the Phoenix area. Some of those extra vehicles were maintained as backup vehicles for use when other vehicles were out for repairs. Others were used by swing drivers to handle "overflow" work, generated

by the fluctuating day-to-day demand on certain routes. Further, there was evidence that routes and vehicles assigned to a particular route may be modified from day to day "to meet delivery needs."

After Morton filed suit alleging that UPS failed to accommodate her and failed to engage in the interactive process required by the ADA, UPS moved for summary judgment. On October 6, 1999, the district court granted UPS's motion for summary judgment, on the grounds that no reasonable accommodation was available and that Morton could not perform the essential functions of the job of package car driver.[3]

II. Analysis

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability. . . ." 42 U.S.C. § 12112(a). An individual is a "qualified individual with a disability" if she can perform the essential functions of the position that she holds or desires, with or without reasonable accommodation. 42 U.S.C. § 12111(8); *Kennedy v. Applause*, 90 F.3d 1477, 1481 (9th Cir. 1996); *see also Cripe v. City of San Jose*, 261 F.3d 877, 884 (9th Cir. 2001). It is an act of discrimination to fail reasonably to accommodate a qualified employee with a disability unless the employer can show that such an accommodation would impose an undue hardship. See 42 U.S.C. § 12112(b)(5)(A); *see also McAlindin v. County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999), *amended by*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000);

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[3] Morton's motion for summary judgment was denied by the district court. This aspect of the district court's decision is not presently before us on appeal.

Braunling v. Countrywide Home Loans Inc., 220 F.3d 1154, 1157 (9th Cir. 2000).

UPS concedes that it refused to promote Morton to the position she sought solely on account of her hearing impairment, and does not dispute that the impairment constitutes a disability for purposes of the ADA. So the issues for decision concern UPS's contentions that the ADA permits it to refuse to hire Morton as a package car driver because (1) it would not be possible to accommodate Morton without violating the seniority provisions of the collective bargaining agreement; (2) Morton is not a "qualified individual" because the ability to drive DOT-certified cars is an essential function of the job of package car driver; (3) accommodating Morton would constitute an undue hardship; and (4) employing only DOT-certified individuals as drivers is a safety-related "business necessity" for UPS. In this complex statute with its layers of seemingly redundant employer defenses, sorting out the appropriate roles of these various defenses poses some interesting quandaries, as we shall see.

A. The collective bargaining agreement

The focus of the district court opinion was its holding that no reasonable accommodation was available within the terms of the collective bargaining agreement. Although the "reasonable accommodation" issue logically arises only after one has determined that the individual seeking relief is "qualified," it is more orderly for present purposes to begin with the issues the district court addressed and then proceed to the ones it did not. Reviewing it de novo, *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1133-34 (9th Cir. 2001), we find no support in the record for the district court's reasonable accommodation finding.

Although some potential accommodations (such as assigning Morton to a route using a non-DOT vehicle, an assignment which she lacks sufficient seniority to obtain in the bidding process) would conflict with the collective bargain-

ing agreement, others would not. In particular, the requirements of the collective bargaining agreement in no way conflict with the accommodation actually requested by Morton – employment as a swing driver of only non-DOT vehicles.[4]

The collective bargaining agreement requires UPS to make any new full-time route available via the seniority-based bidding process. Thus, even though reasonable accommodation "may include ... job restructuring ... or modified work schedules," 42 U.S.C. § 12111(9)(B), under the seniority provisions of the collective bargaining agreement, UPS could not accommodate Morton by creating a new full-time fixed route specifically for her. Other employees would have the right to bid on any such newly created route, and more senior employees would presumably prevail over

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[4] The record indicates that, under a collective bargaining agreement that became effective in 1997, UPS must allocate swing driver assignments that are expected to last more than a week via a seniority-based bidding process among available swing drivers. While this change may affect how much non-DOT swing driving work is available for UPS to assign to drivers, like Morton, who are not DOT-certified, for liability purposes the change is irrelevant: The record indicates that in February 1995, when UPS refused to hire Morton as a driver, the company had unlimited discretion with respect to allocation of swing driving assignments among swing drivers as well as with respect to assignment of particular vehicles to routes. Moreover, had UPS hired her in 1995, Morton would have had two years' seniority for purposes of bidding on those swing driving assignments open to bidding under the 1997 collective bargaining agreement. The impact of the 1997 amendments therefore pertains only to prospective relief. Whether the amendment in fact significantly affects the availability of the prospective accommodation that Morton seeks, if any, can be considered at that stage, should liability be established at trial.

Morton because the route would, for the reasons outlined above, be regarded as a desirable one. *See Willis v. Pacific Mar. Ass'n*, 244 F.3d 675, 679-80 (9th Cir. 2001).

Nothing in the collective bargaining agreement, however, prevents UPS from accommodating Morton by hiring her as a swing driver and assuring that she is assigned to drive only non-DOT vehicles. The record establishes that the collective bargaining agreement does not limit UPS's authority with respect to assigning vehicles; it is only the allocation among drivers of the fixed geographic routes that is affected by the seniority provisions of the collective bargaining agreement. *Compare id.* at 679 (noting that plaintiffs "do not contend nor have they demonstrated that alternative accommodations may have been available outside the seniority provisions of the collective bargaining agreement."). For this reason, and because swing drivers in 1995 had no entitlement to choose among swing driving assignments according to seniority (and after 1997 have only a limited right to do so), any requirement that UPS accommodate Morton by structuring swing driving assignments to ensure that she could drive a non-DOT vehicle would not violate the collective bargaining agreement.

We conclude that Morton's requested accommodation, whether or not otherwise mandated by the ADA, in no way implicates the seniority provisions of the collective bargaining agreement.

B. Essential Function/Reasonable Accommodation/Undue Hardship

UPS argues, and the district court held, that for logistical reasons relating to scheduling, UPS is justified in treating the ability to drive every UPS vehicle as an essential function of the job of package car driver. Thus, according to UPS, Morton is not a "qualified individual," because she is unable to drive the approximately 90% of UPS's vehicles that are regulated by DOT. The district court agreed with UPS's conten-

tion that it would be "impossible to provide Morton with full-time work as a swing driver driving only light weight vehicles."

In this court, UPS makes its argument concerning the need to drive DOT-regulated vehicles in the guise of both an essential function argument – that Morton simply could not do the job – and an undue hardship defense – that the requested accommodation entails burdensome practical difficulties.[5] Both arguments depend on the same factual assertions. *Cf. Cripe*, 261 F.3d at 885 n.7 (noting that essential function and undue hardship analyses often overlap). In reviewing the summary judgment record, we have determined that there are controverted issues of fact on these two issues. On this record, a jury could find both that a driver without DOT certification could perform the essential functions of the swing driver job with accommodation, and that the accommodation was not unduly burdensome on UPS. Thus, the grant of summary judgment based on the essential function argument was erroneous, and we will not affirm based on UPS's alternative undue hardship argument.

More specifically: Although consideration is given to the employer's view as to the essential functions of a job, "an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description." *Id.* at 887 (citation omitted). A job's "essential functions" are its "fundamental" duties, not the "marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). The record contains conflicting evidence as to whether the ability to drive UPS's lar-

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[5] The district court did not rule on UPS's undue hardship argument, as it granted summary judgment on the "essential functions" issue.

ger trucks is an essential function of the package car driver position.

The evidence favorable to UPS includes declarations from UPS personnel stating that it would not be possible to keep a swing driver fully occupied with driving assignments if she were precluded from driving DOT vehicles. Assuming, however, that a finding to this effect would establish that driving DOT vehicles is an essential function of the package car driver position, factual details contained in the record are inconsistent with the very general assertions in support of such a finding contained in UPS's declarations.

First, with respect to that component of swing driving work that involves substitution for absent drivers on assigned routes, the district court incorrectly assumed that the assigned routes using non-DOT vehicles were evenly distributed among UPS's five Phoenix "centers." In fact, the evidence before the district court established that the non-DOT routes are heavily concentrated in two of the centers (as one would expect, since the non-DOT routes are more prevalent in some geographical areas than in others). The declarations of UPS's Center Managers show that in the Glendale center, there is one swing driver for every five assigned routes, and that there are five assigned routes that use non-DOT vehicles. Similarly, in the East center, the ratio of swing drivers to assigned routes is 1:3.9, and there are four assigned routes that use non-DOT vehicles. The evidence tends to show that a swing driver operating only non-DOT vehicles would be occupied full time servicing the assigned routes using non-DOT vehicles out of those centers.

Second, the district court failed to consider another type of driving work performed by swing drivers. There was evidence before the district court that swing drivers are used by UPS to drive not only as substitutes on fixed routes, but also for overflow work, necessitated when the shipment volume for a given route is greater than normal. The proportion of

overflow work handled using non-DOT vehicles is unclear from the record. Absent evidence showing that the amount of non-DOT swing driver work was insufficient to affect the availability of a full-time non DOT-certified swing driver position, Morton's evidence showing that overflow work is a component of the work performed by swing drivers would further support an inference that UPS could employ a swing driver limited to driving non-DOT vehicles.

Finally, there is also in the summary judgment record undisputed evidence that under the collective bargaining agreement swing drivers may displace part-time warehouse workers when there is insufficient driving work, and that swing drivers do routinely perform non-driving work. UPS does not contend that Morton could not perform the warehouse work or other tasks that swing drivers sometimes perform. Thus, the prospect that because Morton is not DOT-certified UPS may have to assign her occasionally to perform warehouse work cannot establish her inability to perform the essential functions of the swing driver job.

UPS contends that we may not address this last consideration because Morton did not specifically mention it below. Morton did, however, argue that she could perform the essential functions of the job she was seeking, with reasonable accommodation, and she included the evidence pertaining to this particular possible accommodation in the attachments to her summary judgment papers. More specific argument concerning each conceivable accommodation was not necessary, in the circumstances of this case, to allow the plaintiff to explain to us on appeal what the record specifically before the district court on summary judgment indicates concerning the essential functions/reasonable accommodation analysis.

Those circumstances, most notably, include the fact that UPS, by its own admission, did not participate with the plaintiff in the interactive process that the statute contemplates. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1113-14 (9th

Cir. 2000) (en banc), *cert. granted*, 121 S.Ct. 1600 (2001) (granting certiorari on an unrelated issue). *Barnett* holds that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Id.* at 1116; *see also id.* ("[S]ummary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith.") It is the employer's responsibility, through participation in the interactive process, to assist in identifying possible accommodations. *Id.* at 1115. Here, UPS does not argue that it *did* engage in good faith in the interactive process.[6] The question whether this failure should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, should bear the burden of persuasion throughout the litigation. *See id.* at 1115-16 ("[T]he jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations.").[7]

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[6] For that reason, and because the employer's ultimate liability under *Barnett* turns on the availability of a reasonable accommodation, we do not independently address the interactive process cause of action, but we do reverse the summary judgment as to that claim as well as the ones we do discuss.

[7] *Barnett* can be read as holding that an employer who has not engaged in the interactive process is not entitled to summary judgment no matter what the evidence on summary judgment shows concerning the actual availability of a reasonable accommodation. It is odd, however, to delay until trial an issue that is fact dependent, if proof of the relevant facts – here, the facts pertinent to proving that a relevant accommodation was available – *will* be necessary at trial. We therefore understand *Barnett* as holding,

[Footnote continued on next page]

For all these reasons, we conclude that on the present record, a reasonable juror could determine that driving DOT vehicles was not an essential function of the job of package car driver.

UPS argues, however, that even if Morton could perform the swing driver job's essential functions, accommodating her so she could do so would constitute an "undue hardship." Employers are required to make only "reasonable accommodations" that do not impose "undue hardships" on them. 42 U.S.C. § 12112(b)(5)(A) (2001); *see also Cripe*, 261 F.3d at 885 n.6. The Act defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" various factors. 42 U.S.C. § 12111(10)(A). These factors include the nature and cost of the accommodation, the size and resources of the covered entity, and the effect of the accommodation on the operations of the covered entity. 42 U.S.C. § 12111(10). Undue hardship analysis is thus a fact-intensive inquiry, rarely suitable for resolution on summary judgment. *See Humphrey*, 239 F.3d at 1139. Further, and critically for present purposes, "[t]he ADA's reasonable accommodation requirement puts the burden on the employer to show that a proposed accommodation will cause undue hardship." *Barnett*, 228 F.3d at 1113; *see also* 42 U.S.C. § 12112(b)(5)(A) (An employer violates the ADA by "not making reasonable accommodations . . . unless such *covered entity can demonstrate* that the accommodation would im-

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[Footnote continued from previous page]
instead, that the task of proving the negative – that *no* reasonable accommodation was available – rests with an offending employer throughout the litigation, and that, given the difficulty of proving such a negative, it is not likely that an employer will be able to establish on summary judgment the absence of a disputed fact as to this question.

pose an undue hardship on the operation of the business of such covered entity.") (emphasis added).

Looked at in light of these considerations, the summary judgment record before us is clearly insufficient to warrant summary judgment for UPS on this closely related alternative ground. The degree of the "difficulty" of accommodating Morton – a central inquiry in an undue hardship analysis – is, as explicated above, very much disputed, and UPS presents essentially no concrete evidence regarding the "expense" of accommodating Morton, either absolutely or in light of its own "size and resources" (which are obviously both quite large). Thus, we may not affirm on this alternative ground.

C. Business necessity

Finally, UPS asks us to affirm on another basis not addressed by the district court – that its use of the DOT certification requirements as a screening test for all drivers is permissible under the "business necessity" rule, because the DOT certification requirements effectively encompass safety requirements that UPS may, consistent with the ADA, impose on all drivers.

The ADA defines "discrimination" to include the use of:

> qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6). The statute goes on to state that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria

> that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and that such performance cannot be accomplished by reasonable accommodation, as required by this subchapter.

42 U.S.C. § 12113(a).[8] While an individualized assessment of the applicant's ability to perform the essential functions of the job is normally required by the ADA, *see, e.g.*, *McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999), an employer may require disabled employees as well as others to meet an across-the-board qualification standard if it can establish the stringent elements of the business necessity defense. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 568 (1999); *Cripe*, 261 F.3d at 890.

1. *Direct Threat Defense*: Morton contends that safety-related qualification standards may be applied to screen out a job applicant only where the applicant poses a threat to others

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[8] These two provisions – as well as other parts of this statute, *see, e.g.*, 42 U.S.C. § 12112(d)(4)(A) – appear to be largely redundant, although their wording does differ somewhat. It would have been more orderly, to be sure, had the affirmative discrimination provision left out the truncated version of the defense that is then repeated, with elucidation, in the separate section directed at "Defenses." Despite the general principle against construing a statute so as to contain redundancies, *see Gutierrez v. Ada*, 528 U.S. 250, 258 (2000), we cannot avoid the conclusion here that the two versions of the general business necessity defense are intended to encompass the same basic requirements. Absolutely no other explanation of the interaction of the two provisions comes to mind. We therefore use the language of both sections to determine the scope of the defense.

in the workplace. In other words, she argues that *all* safety-related qualification standards must be defended not under the business necessity framework or any other, but under the ADA's "direct threat" provision, 42 U.S.C. § 12113(b), which reads:

> The term "qualification standards" may include a requirement that an individual shall not pose a threat to the health or safety of other individuals in the workplace.[9]

We disagree.

As the Supreme Court has noted, the position Morton espouses is that "taken by the EEOC in the Interpretive Guidance promulgated under its authority to issue regulations to carry out Title I of the ADA," see 29 C.F.R. pt. 1630, App., §§ 1630.15(b) and (c) (1998) (requiring safety-related standards to be evaluated under the ADA's direct threat standard)." *Albertson's*, 527 U.S. at 569 n.15.[10] The Court in

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[9] We note that this provision of the statute as well poses substantial interpretation challenges. The language of the subsection does not read as setting forth an independent affirmative defense, but that is apparently what Congress intended. *See Albertson's*, 527 U.S. at 569-70.

[10] Although the EEOC has been delegated responsibility by Congress with regard to Title I of the ADA, *see* 42 U.S.C. § 12116, we need not decide the level of deference due to the EEOC's Interpretive Guidance. As we will explain, the EEOC's interpretation cannot be squared with the plain, limited language of the direct threat defense. The intent of Congress is therefore clear, so we would reject the EEOC's interpretation of the statutory direct threat defense even if we were to find that deference under *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), is appropriate.

Albertson's questioned, in *dicta*, whether this construction, "which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements," was a sensible reading of the Act. *See id.* The Fifth Circuit has since held that it is not. *E.E.O.C. v. Exxon*, 203 F.3d 871, 874-75 (5th Cir. 2000). We agree with the Fifth Circuit's result, but for somewhat different reasons.

We note, first, that the direct threat defense is on its face of little applicability here, because it pertains only where the threat is to "other individuals in the workplace." We have indicated that "others in the workplace" under 42 U.S.C. § 12113 includes not only co-employees but also customers, at least where the customers are present in the workplace. *Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1248 (9th Cir. 1999). Here, however, (and in *Exxon*, 203 F.3d at 872), the asserted threat went beyond those present in the workplace to the general public.

That the direct threat defense is so limited, moreover, is a substantial clue to its intended scope. As the Fifth Circuit recounted in *Exxon*, the legislative history of the provision – to which we may surely resort, given the near incoherence of the section read literally (to which we have already alluded), *see United States v. R.L.C.*, 503 U.S. 291, 298 (1992) – indicates that it was intended to codify and expand upon the defense recognized by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). *Exxon*, 203 F.3d at 874-75; *see also E.E.O.C. v. United Parcel Serv., Inc.* ("*UPS*"), 149 F. Supp. 2d 1115, 1164 (N.D. Cal. 2000). *Arline* involved an employee with a contagious disease; the legislative history alludes as well to individuals with mental disabilities and mental illnesses. *See* H.R. Rep. No. 101-485, pt. 3, at 45-46 & n.37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468-69 & n.37.

At the same time, the defense as articulated does not allude to any kind of job-relatedness; in that respect, it differs

profoundly in its scope from both the business necessity defense in the ADA, and from the bona fide occupational qualification defense contained in several other employment discrimination statutes. *See, e.g., W. Airlines v. Criswell*, 472 U.S. 400, 411-17 (1985) (bona fide occupational qualification ("bfoq") defense under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1)); *Autoworkers v. Johnson Controls*, 499 U.S. 187, 200-203 (1991) (same under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1)). Combined with the focus on danger to other individuals in the workplace, the absence of any job-related requirement suggests that the direct threat defense was meant as a very narrow permission to employers to exclude individuals with disabilities *not* for reasons related to their performance of their jobs, but because their mere presence could endanger others with whom they work and whom they serve. *Compare Johnson Controls*, 499 U.S. at 203-204 (bfoq "exception is limited to instances in which sex . . . actually interferes with the employee's ability to perform the job," and so does not extend to risk of injuries to third parties who are neither customers nor third parties whose safety is essential to the business).

This approach to determining the scope of the direct threat defense makes more sense to us in the context of the statute as a whole than the Fifth Circuit's analysis. The Fifth Circuit in *Exxon* viewed the direct threat provision as addressing cases in which an employer responds to the supposed risk created by an individual employee's presence in the workplace, where that risk is not addressed by an existing qualification standard. Under that view, the provision does not apply to a qualification standard applicable to all employees in a given classification; such a qualification standard is properly analyzed under the ordinary business necessity framework. *See* 203 F.3d at 875.

We doubt, however, that Congress intended the *Arline* situation to come out differently under the ADA depending upon whether the employer in question had a preannounced, across the-board policy excluding employees with latent communicable diseases from the workplace, or not. Nor could an employer, in all likelihood, make out a business necessity defense on the facts of *Arline*, as the exclusion of employees with contagious diseases is unlikely to be considered "job-related." Rather, whatever the scope or timing of the employer's policy or decision, where the only danger was to coworkers or others present at the workplace, and where the danger was not one that involved actual job performance, the narrower direct threat defense would apply.

In this case, not only is the alleged danger upon which UPS relies to the public in general, but UPS's concerns about safe driving do centrally involve the performance of the driving job to which Morton aspires. *See UPS*, 149 F. Supp. 2d at 1159 n.3 ("Here, driving without accidents *is* like flying without crashing."). We conclude that the direct threat defense has no application to this case.

2. *Business Necessity Defense*: That conclusion, however, does not necessarily dictate that the business necessity defense does apply, and if it does, how.

The business necessity/job relatedness concept first developed in the Title VII context, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). *Griggs* held that where facially neutral qualification standards had a disparate negative impact on members of a protected class, the employer was liable under Title VII unless it could show that the standard was a job-related "business necessity." 401 U.S. at 431. To meet its burden, the employer had to demonstrate a "significant correlation" between the qualification and important aspects of the job in question. *Id.* at 434. Even if the employer establishes job-relatedness, a plaintiff may still show

that a less discriminatory alternative test would serve the employer's interest, and thereby defeat the attempt to invoke the defense. *Albemarle Paper Co.*, 422 U.S. at 425; *see also* 42 U.S.C. § 2000e-2(k) (1991 amendment to Title VII codifying the business necessity defense). Given that background, it is reasonable to assume that Congress intended the business necessity defense in the ADA to parallel, to the degree the language and structure of the statutes is similar, the previously-developed defense under the earlier-enacted statutes. *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1123 (9th Cir. 2001) (citing *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973), for the proposition that "similarity of statutory language is strong indication that statutes should be interpreted in the same manner").

We cannot ignore, however, that there are distinctions of some note between the business necessity defense in the ADA and the parallel defense in Title VII, distinctions that, we conclude, indicate that the ADA business necessity defense may not mimic in all respects the defense as it has been developed in the earlier statute.

For one thing, under Title VII, the business necessity defense applies only where a facially neutral qualification standard disadvantages a protected group. Where, instead, there is disparate treatment based directly on a proscribed classification, only the more stringent bfoq defense is available.[11] *Johnson Controls*, 499 U.S. at 198. It is the bfoq defense that has ordinarily been invoked when job-related safety requirements distinguishing among members of protected classes are at stake. *See, e.g., Criswell*, 472 U.S. at 419-420.

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[11] Under Title VII, the bfoq defense is not available at all where discrimination is based on race or color.

Applying even that stringent defense, courts have recognized that *safe* transportation – safe for both passengers, if any, and the general public – *is* "reasonably necessary" for transportation companies "to further the overriding interest in public safety," if the employer can show either (1) that "all or substantially all" individuals who cannot meet the employer's qualification cannot perform the job safely; or (2) it is either impossible or highly impractical to determine which employees who lack the qualification may be able to perform safely. *Criswell*, 472 U.S. at 413-14.

It does not appear, however, that the ADA business necessity defense is also limited to qualification standards that do not focus directly on the protected class, here, disabled individuals. The ADA defines "discriminate" to include not only employment practices that result from disparate treatment or create a disparate impact, *see* 42 U.S.C. §§ 12112(a) and (b)(1),(3), and (6), but also a failure to make reasonable accommodations in accord with statutory requirements. *See* 42 U.S.C. § 12112(b)(5) and (7). The business necessity defense, in turn, applies not only where qualification standards "screen out or tend to screen out" individuals with disabilities – language that could well be read as pertaining not only to neutral criteria with a disparate impact[12] – but also to qualification standards that "otherwise deny a job or benefit to an individual with a disability." 42 U.S.C. § 12113(a). It thus appears that a business necessity defense is available where the employer's qualification standard requires a physical or mental capacity that, by definition, a person with a certain

[12] It would be strange, for example, to refer to an employment criterion that entirely and directly precludes the hiring of women as one that "screens out or tends to screen out" women. *See Griggs*, 401 U.S. at 428 n.3 (using the phrase "screen out" to connote a neutral standard with a disparate impact).

kind of disability cannot demonstrate – here, passing a hearing test at a certain level.

We have previously so assumed under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-961. *See Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (applying a business necessity analysis to claim of risk posed by diabetic condition of an employee); *cf.*, 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims]."). The seminal case under the Rehabilitation Act regarding the business necessity defense, *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1980), cited approvingly in the pertinent ADA legislative history, *see* H.R. Rep. No. 101-485, pt. 3, at 42 n.32, *reprinted in* 1990 U.S.C.C.A.N. 445, 465 n.32, did portray the defense as limited to disparate impact situations. 662 F.2d at 307-08. *Prewitt*, however, considered determinations based directly upon the employee's physical condition as raising only disparate impact concerns. *See id.* at 306-09. So *Prewitt* supports the conclusion that Congress intended to provide for a business necessity defense with regard to qualifications standards that focus directly on an individual's disabling or potentially disabling condition.

At the same time, three other provisions of the ADA suggest that Congress must have intended to permit across-the-board exclusion of employees based upon disability-related safety criterion only on a showing somewhat similar to the one used for safety qualifications under the Title VII and the ADEA bfoq standard.[13]

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[13] It may, however, be somewhat easier for an employer to make out a safety-related defense under the ADA than under Title VII or the ADEA, as actual physical impairments may correlate more

[Footnote continued on next page]

First, although there is no bfoq defense as such in the ADA, there *is* a threshold requirement that a covered employee or prospective employee must be a "*qualified* individual with a disability" – that is, "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8) (emphasis supplied); *see also* 42 U.S.C. § 12112(a). That language to some degree expresses concepts similar to those reflected in the bfoq defense as it pertains to safety concerns. *See Criswell*, 472 U.S. at 413 (To be permissible, safety qualifications must be "*reasonably necessary* to the *essence* of the business.") (second emphasis added). The job-relatedness feature of the ADA business necessity defense, then, must pertain only to *essential* functions of the job, so as to mesh with the statute's affirmative provisions. The House Committee Report on the bill that became the ADA reflects precisely this understanding. *See* H.R. Rep. No. 101-485, pt. 3, at 32, *reprinted in* 1990 U.S.C.C.A.N. 445, 454-55 ("If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, and not marginal, aspect of the job . . . [and] be carefully tailored to measure the actual ability of a person to perform an essential function of the job.").

Second, the ADA also contains another affirmative employer defense, for "undue hardship," that can involve assertions of employer interests similar to those encompassed by the business necessity defense. The undue burden defense, however, concerns not across-the-board qualification standards but a particularized inquiry – "whether it is too onerous

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readily with safety risks than surrogates for such impairments, such as age.

for a particular employer to make a specific accommodation sought by a specific employee." *Cripe*, 261 F.3d at 890. We held in *Cripe* that the ADA business necessity defense must necessarily be quite stringent, because the undue burden defense is itself "strict," and "[t]o excuse a generally discriminatory provision, which is what the business necessity defense does, certainly requires more of a showing than is needed to excuse an employer from accommodating a specific employee under the undue hardship standard." *Id.* An employer attempting through the business necessity defense "to excuse a generally discriminatory provision" therefore must make a convincing showing both in demonstrating the correlation between the qualification standard and safe job performance and in proving the difficulty of using less restrictive alternatives. In light of the layers of ADA defenses and the "necessity" and "job-related" criteria contained in the ADA business necessity provision, it is hard to see why this showing should differ significantly from the "reasonably necessary to the essence of the business" requirement as applied under the Title VII and ADEA bfoq provisions.

Finally, the ADA business necessity defense contains an additional requirement that is specific to the ADA: To validly exclude an employee from employment or the benefits thereof, a qualification standard not only must be "job-related and consistent with business necessity," but also must be incapable of modification through a reasonable accommodation that would permit a disabled employee to meet the standard.[14]

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[14] Yet again, the actual language of the statute in this regard is confusing: The reasonable accommodation provision refers to "such performance," but nothing in the remainder of § 12113(a) refers to any "performance" (although one does speak of "performing" on a test, and tests are *among* the kinds of requirements that may be permissible under the defense).

The precise scope of this corollary is open to some dispute. *See UPS*, 149 F. Supp. 2d at 1163-64 (holding that the reasonable accommodation aspect of the business necessity defense does not require "individual assessment of the ability of each applicant to perform the essential job functions," but only individual accommodation with regard to meeting the qualification standard);[15] *id.* at 1164 n.8 (recognizing that there is one passage in the legislative history indicating that under the ADA, otherwise valid across-the-board qualification standards are subject to an individualized assessment of ability to do the job). We do not resolve that significant issue here; it has not been briefed, and we ultimately conclude that UPS has not met its business necessity burden on summary judgment, however one understands the reasonable accommodation aspect of the ADA business necessity defense. We do note that, however construed, this aspect of the ADA business necessity defense demonstrates that Congress intended to permit employer insistence upon across-the-board qualification standards only if those standards "provide an accurate measure of an applicant's actual ability to perform the job. . . ." H.R. Rep. No. 101-485, pt. 3, at 42, *reprinted in* 1990 U.S.C.C.A.N. 445, 465. If a transportation employer can demonstrate neither that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger nor that it is highly impractical more discretely to determine which disabled employees present such an unac-

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[15] So, for example, if a job required a certain level of mathematical skill, tested by a pre-hire examination, an employee who, because of a disability, could not write could not be denied the position if the test could be given orally. If this were the meaning of the reasonable accommodation caveat, it would not be relevant here, as it is undisputed that Morton cannot satisfy the DOT hearing requirement with or without accommodations.

ceptable risk – the Title VII/ADEA bfoq safety standard requirements – we would not think that the safety criterion would provide an accurate measure of actual ability.

In the end, then, the traditional understanding that the bfoq defense is more stringent than the Title VII business necessity standard should be of little relevance in assessing the validity of safety standards under the ADA business necessity defense. Essentially the same considerations – the nature of the risk, the adequacy of the connection shown between the employer's qualification standard and alleviation of the risk, and the showing of the *necessity* of across-the-board rather than individualized determinations – are likely to be relevant in both instances, and to the same extent. We therefore draw on both articulations – the traditional, general business necessity standard, and the more tailored bfoq safety standard – in determining whether UPS has on this summary judgment record met its burden regarding the validity of its rule precluding all employees who fail the DOT's hearing standard from driving trucks *not* regulated by DOT.

3. *Application to this Case*: On this summary judgment record, UPS has not met its burden of showing that there is no triable issue as to job-relatedness or business necessity such that the company is entitled to judgment as a matter of law. We caution at the outset that we are in no way suggesting that the burden may not be met at trial. Nor are we requiring that UPS employ deaf drivers of non-DOT vehicles if it can show either that substantially all of them present a higher risk of accidents than non-deaf drivers or that there are no practical criteria for determining which deaf drivers present a heightened risk and which do not.

UPS conceded below, however, that it had never itself undertaken any independent study or determination of the appropriateness of applying the DOT hearing standard to non-DOT vehicles. That is understandable, as UPS's principal defense in this case has been that it is entitled to require

all drivers, for practical rather than safety reasons, to be DOT eligible. UPS therefore seeks principally to rely upon DOT's hearing standard for trucks weighing over 10,000 pounds, maintaining that it should not be required independently to establish the need for such a requirement for smaller trucks.

Initially, UPS argues that it may simply apply the DOT-certification standards more broadly than it is required to by law, citing *Albertson's*, 527 U.S. at 577-78. *Albertson's*, however, does not stand for such a broad proposition. Rather, *Albertson's* held only that an employer need not justify its application of the DOT qualification standard as enacted (that is, to drivers of D T vehicles), despite the existence of an experimental pro ram in which the DOT vision standard could be waived in individual cases. The Court in *Albertson's* emphasized that the employer sought only to apply an "otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally," *id.* at 577, and indeed emphasized "that Albertson's here was not insisting upon a job qualification merely of its own devising." *Id.* at 570. This rationale does not apply to the application of government safety standards *beyond* their intended scope, to drivers and vehicles that DOT has expressly chosen not to regulate. *See Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) (TWA could not establish a bfoq with regard to age requirements for flight engineers simply by relying on the validity of such FAA-imposed requirements for pilots).

So the existence of the – by its own terms inapplicable – DOT standard cannot shoulder UPS's statutory burden. Instead, to establish its entitlement to the business necessity defense, UPS must show that its standard, "*as used by the covered entity*, is . . . job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6) (emphasis added).

There is limited and conflicting evidence in the record, again derived in the main from DOT materials, regarding (i) whether deaf drivers like Morton are statistically less safe than other drivers that UPS employs, and (ii) whether non-DOT vehicles pose a sufficient safety threat to warrant application of the DOT standards to them.

On the first point, UPS offered the declaration of Kenneth Pierson,[16] who identified two studies showing that deaf *male* drivers of passenger cars were involved in approximately 1.8 times as many accidents as non-deaf drivers. A study limited to male drivers may not extrapolate to drivers generally, and, indeed, the same studies "found no difference in accident records for [deaf] female drivers." While both Pierson and the authors of one study offered speculation as to why this finding might not constitute scientifically valid evidence that female deaf drivers are actually as safe as non-deaf drivers (such as that the sample of female drivers was too small to draw firm conclusions, and that female drivers may drive less than male drivers), this speculation is not evidence. Put another way, what evidence there is in the record negates any conclusion that all or substantially all deaf drivers present a heightened risk of accidents; as the record now stands, it appears that only some of them do.

On the second point, there is evidence in the record regarding a DOT finding that non-DOT commercial vehicles

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[16] Morton has filed a motion to strike portions of this declaration pertaining to knowledge that Pierson claims to have regarding why DOT declined to regulate vehicles having a gross vehicle weight of 10,000 pounds or less. Because that portion of Pierson's declaration does not affect our decision, we need not address this motion at this point, but we vacate the district court's denial of the motion as moot so that the district court may reconsider the motion on remand.

"generally pose no greater safety risk than other vehicles of similar or lesser weight." *See* 53 Fed. Reg. 18,042 (1988). We note in passing that DOT's statement was in response to a comment by UPS on a proposed rule. UPS's comment (which DOT rejected) suggested that DOT should regulate commercial vehicles with gross vehicle weights below 10,001 pounds. UPS has submitted evidence suggesting that non-DOT vehicles are as or nearly as dangerous as DOT vehicles, in the form of the Pierson declaration's discussion of various scientific studies. This evidence raises a triable issue as to whether the safety considerations underlying the physical requirements for drivers of DOT vehicles are applicable to non-DOT vehicles as well, but it does not bolster the thin record sufficiently to meet UPS's summary judgment burden.

Moreover, the present record in no way addresses the question whether it would be possible to determine which deaf drivers present a higher risk of accidents and which – if any – do not. Some obvious considerations affecting the level of risk suggest themselves, including the drivers' personal driving record, the precise nature of the hearing loss (Morton, for example, says that she can hear car horns), and whether they have had or could have in the future special training concerning particular safety precautions that can mitigate loss of hearing as a driving risk. Further, in considering whether the ban on deaf drivers of non-DOT trucks is "reasonably necessary" to UPS's business (or correlated with an essential function of the driver's job, driving safely), the level of risk that UPS accepts for drivers generally and for ascertainable subgroups of drivers is pertinent. *Cf. Johnson Controls*, 499 U.S. at 220 (White, J., concurring in part and concurring in the judgment) (necessary in bfoq analysis to "consider the level of risk avoidance that was part of [the employer's] 'normal operation'").

In sum, the record does not permit judgment as a matter of law for UPS on its business necessity defense. If UPS

were able to show that empirical evidence in this area is so difficult to come by that it is impossible to identify specific risk factors and then use those factors to sort disabled applicants into risk categories, then its application of an overinclusive qualification standard might meet the business necessity test, by virtue of UPS's undeniable interest in hiring safe drivers. And we reiterate that it may well be that the reason for the paucity of the evidence in the record is UPS's choice of litigation strategies, not that UPS's concerns about heightened accident risks for non-DOT drivers when the drivers cannot hear are insubstantial or unprovable. But on this summary judgment record, we are unable to conclude that the application of the DOT requirements beyond their intended scope serves important job-related functions, or that no less discriminatory alternative could serve UPS's interests. We therefore decline to affirm on this alternative ground, and instead remand to the district court so that it may address these factual questions in the first instance, after opportunity for further factual development. *See Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182-83 (9th Cir. 1999).

III. Conclusion

The district court erred in holding that the collective bargaining agreement barred Morton's requested accommodation. The court also erred in granting summary judgment to UPS in the face of conflicting evidence as to the logistical and safety-related reasons UPS offered for not hiring Morton.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JANA L. MORTON,	)	
	)	
Plaintiff,	)	CIV 96-2813 PHX SMM (JWS)
	)	
vs.	)	ORDER FROM CHAMBERS
	)	
UNITED PARCEL SERVICE, INC.,	)	[RE: Cross Motions for Summary Judgment – Dockets 76 and 89; Motion to Strike Affidavit of Pierson - Docket 112]
	)	
Defendant.	)	
	)	

I. MOTIONS PRESENTED

At docket 76, plaintiff Jana L. Morton ("Morton") moves for partial summary judgment on the Americans with Disabilities Act claim. At docket 89, defendant United Parcel Service, Inc. ("UPS") cross moves for summary judgment on the American with Disabilities Act claim and the Arizona Civil Rights Act claim. Oral argument was heard October 1, 1999.

This order also addresses Morton's motion to compel supplemental disclosure of earnings and damages information at docket 99, and Morton's motion to strike the affidavit and evidence from expert witness Kenneth L. Pierson at docket 112.

II. BACKGROUND

Morton suffers from a hearing disability. In February 1995, Morton applied for a full-time position as a package car driver at UPS' Phoenix office. As part of the application process for the package car driver position, UPS required Morton to undergo a Department of Transportation ("DOT') physical.

The DOT regulates commercial motor vehicles.[1] Commercial motor vehicles are vehicles that weigh over 10,000 pounds ("DOT vehicles").[2] Under DOT regulations, only drivers that obtain a medical examiner's certificate evidencing that he or she has met the DOT's physical qualifications for drivers may drive DOT vehicles.[3] The majority of UPS delivery vehicles are over 10,000 pounds.

Morton suffers from a hearing disability. Morton did not pass the DOT physical because she did not meet the DOT hearing requirements.[4] UPS did not hire Morton for the full-time package car driver position because she was not DOT certified. Morton filed this lawsuit alleging that UPS vio-

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[1] 49 C.F.R. § 390.3.

[2] *Id.* at § 390.5.

[3] *Id.* at § 391.41.

[4] A driver must be able to "First perceive[] a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951." 49 C.F.R. § 391.41(b)(11).

lated the Americans with Disabilities Act and the Arizona Civil Rights Act by failing to accommodate her disability.

III. SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[5] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[6] Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[7] All evidence presented by the non-movant must be believed for purposes of summary judgment and all justifiable inferences must be drawn in favor of the non-movant.[8] However, the non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[9]

IV. DISCUSSION

A. ADA

The Americans with Disabilities Act ("ADA") prohibits an employer from discriminating "against a qualified indi-

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[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[6] *Id.* at 323-325.

[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-9 (1986).

[8] *Id.* at 255.

[9] *Id.* at 248-9.

vidual with a disability because of the disability. . . ."[10] A "qualified individual with a disability" is one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desired."[11] To establish a prima facie case of discrimination under the ADA, the plaintiff employee must show that (1) she is disabled within the meaning of the ADA; (2) she is able to perform the essential functions of the job with or without reasonable accommodation; and (3) she suffered an adverse employment action because of her disability.[12]

The parties do not dispute that Morton is disabled within the meaning of the ADA or that Morton was not hired as a full-time package car driver because of her hearing disability. The dispute centers on whether Morton is able to perform the essential functions of the package car driver position with reasonable accommodation.

1. Reasonable Accommodation

"Where the ADA claim is based on an employer's refusal to make a reasonable accommodation, the plaintiff bears the burden of producing evidence that 'a specific, reasonable accommodation was available to the defendant at the time plaintiff's limitation became known.'"[13] Hypothetical accommodations are insufficient."[14]

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[10] 42 U.S.C. § 12112(a).

[11] *Id.* at § 12111(8).

[12] *Barnett v. U.S. Air., Inc.*, 157 F.3d 744, 748 (9th Cir. 1998).

[13] *Willis v. Pacific Maritime Association*, 162 F.3d 561, 564 (9th Cir. 1998) (quoting *Barnett*, 157 F.3d at 748).

[14] *Id.*

Morton admits that she could not drive UPS delivery vehicles weighing over 10,000 pounds. But Morton argues that UPS also delivers packages in vehicles weighing less than 10,000 pounds ("lightweight vehicles") and therefore UPS could have accommodated her disability by assigning her to a lightweight vehicle. UPS argues that the accommodation Morton proposes would violate the seniority system established under the collective bargaining agreement.

UPS package car drivers are represented by the Teamsters Union. The terms of UPS package car drivers' employment are set out in a collective bargaining agreement ("CBA") between the Teamsters and UPS.[15] The CBA establishes a seniority system under which package car driving routes are assigned. When a route becomes available the route is posted and bid on. The bidder with the most seniority is assigned the route. When an employee is initially hired as a full-time package car driver he or she does not have any seniority and is not assigned a route, but rather works as a "swing driver." Swing drivers are relief drivers, filling in where needed as dictated by other employees' absences. Once a swing driver accumulates enough seniority, he or she may bid on a posted route.

At the time in question UPS's Phoenix centers serviced 254 delivery routes. Only fourteen of the 254 routes were served by lightweight vehicles weighing less than 10,000 pounds. The lightweight vehicles are typically used to deliver packages to residential areas or to outlying rural areas. Therefore, routes serviced by lightweight vehicles generally

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[15] The CBA governing package car drivers in Phoenix actually consists of three agreements: the National Master UPS Agreement, the Western Conference of Teamsters UPS Supplemental Agreement, and the Package, Feeder and Mechanics Addendum.

require less physical exertion, because packages delivered to residents tend to be smaller and lighter than nonresidential deliveries and rural routes tend to require more driving between deliveries. Because the routes delivered by lightweight vehicles require less physical exertion, they are more desirable than routes delivered by DOT vehicles and are successfully bid on by only the most senior drivers.

Had Morton been hired as a package car driver she would have had no driver's seniority. If UPS assigned an employee with no seniority to the most desirable route it would have violated the seniority system established in the CBA. An employee's proposed accommodation is per se unreasonable if it conflicts with a bona fide seniority system established under a CBA."[16]

Morton argues that assigning her to a lightweight vehicle would not violate the seniority system. As evidence that her proposed accommodation does not violate the seniority system, Morton submits the following June 16, 1995 memo from UPS' Corporate Health & Safety Manager to the Region and District Human Resources Manager:

> Subj: Driver Reasonable Accommodation Protocol
>
> In the Past, UPS has maintained a policy that if a driver failed any part of the D.O.T. physical, that driver would be prevented from operating a UPS vehicle. With the passage of the Americans with Disabilities Act (ADA), UPS took a closer look at that policy and is now implementing a new protocol that may allow certain D.O.T. disqualified drivers the opportunity to operate specific UPS vehicles.

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[16] *Willis*, 162 F.3d at 565-68 (9th Cir. 1998).

> Driver candidates with insulin-treated diabetes mellitus (IRDM) or visual impairments will be individually assessed upon request to determine their ability to safely operate UPS vehicles weighing 10,000 pounds or less.

Morton argues that the Driver Reasonable Accommodation Protocol establishes that UPS is willing to assign a disabled driver to a lightweight vehicle. But the protocol does not say that UPS will provide DOT disqualified drivers with opportunities that violate the seniority system established in the CBA. Further, the protocol states that it "*may* allow *certain* D.O.T. disqualified drivers the opportunity to operate specific UPS vehicles" and then goes on to provide examples that do not apply to Morton.

Next, Morton argues that UPS has accommodated other disabled package car drivers by assigning them to non-DOT vehicles and therefore assigning her to drive a non-DOT vehicle is a reasonable accommodation. Morton submits a Return to Work Agreement from 1995 showing that after UPS package car driver Yvonne Harbison lost vision in her right eye and could no longer meet DOT standards, UPS accommodated her disability by allowing her to deliver her route in a non-DOT vehicle. Morton also submits evidence of another 1995 reasonable accommodation agreement showing that after UPS package car driver Steve Summers developed diabetes, UPS accommodated his disability by allowing him to deliver his route with a vehicle weighing less than 10,000 pounds.

Morton overlooks a significant distinction between the circumstances under which Harbison and Summers were accommodated and her own circumstances. Both Summers and Harbison became disabled after they were hired as package car drivers. Summers and Harbison had already accrued seniority and could successfully bid on routes that could be delivered with non-DOT vehicles. Thus, accommodating

Summer and Harbinson did not implicate another UPS employee's seniority rights. Further, in 1995, the Ninth Circuit had not yet ruled in *Willis v. Pacific Maritime Association* that accommodations that violate a seniority system established in a CBA are per se unreasonable.[17]

Morton also submits testimony from Joseph Rhein, a business agent for the local branch of the Teamsters Union, to support the proposition that Morton's proposed accommodation would not violate the CBA's seniority system. Rhein testifies that he is familiar with the CBA between the Teamsters and UPS governing package car drivers, but Rhein does not testify that Morton's proposed accommodation would not violate the seniority system.

Finally, Morton argues that she could have worked as a swing driver until she accrued enough seniority to bid on a lightweight vehicle route. UPS responds that it would have been impossible for it to provide Morton with full-time work as a swing driver driving only lightweight vehicles. The 254 routes UPS' Phoenix office services are divided between five centers. Every package car driver is assigned to a specific center. The driver only drives for that center and only earns seniority in that center. Therefore, of the approximately 50 routes assigned to each center only three routes are delivered by lightweight vehicles. The court agrees with UPS, that it is unrealistic to expect three employees to be absent due to illness, vacation, or whatever frequently enough to provide a swing driver with full-time employment.

Morton has not met her burden to show a specific, available and reasonable accommodation that would enable her to perform the essential functions of the package car driver position.

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[17] *Id.*

2. Interactive Process

Morton argues that UPS failed to engage in an interactive process with her to find a reasonable accommodation. In *Barnett v. U.S. Air, Inc.*, the Ninth Circuit held that employers are encouraged, but not required to engaged in an interactive process with their disabled employees:

> The ADA and its regulations do not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation. . . . If the employer is incorrect in its assessment of the existence of reasonable accommodation that would not unduly burden the employer . . . the employer is liable under the ADA for failing to provide reasonable accommodation. Thus, an employer's decision not to engage in an interactive process may put it at peril, but it does not create liability independent from a resulting failure to accommodate the employee's disability.

B. State Law Claims

Morton also alleges that UPS violated the Arizona Civil Rights Act. Morton's state disability discrimination claim fails for the same reasons her ADA claim fails.[18]

V. CONCLUSION

For the above reasons, Morton's motion for partial summary judgment at docket 76 is DENIED. UPS's cross motion for summary judgment at docket 89 is GRANTED. Morton's motion to compel supplemental disclosure of earnings and damages information at docket 99 and motion to

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[18] *See Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 899 fn 3 (D. Ariz. 1997).

strike the affidavit and evidence from expert witness Kenneth L. Pierson at docket 112 are both DENIED as MOOT.

DATED at Phoenix, Arizona, this 4th day of October 1999.

/s/
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

APPENDIX C

Section 102(a) of the ADA, 42 U.S.C. § 12112(a), provides, in pertinent part: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring [or] advancement . . . of employees . . . ."

Section 101(8) of the ADA, 42 U.S.C. § 12111(8), provides, in pertinent part:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . . [C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Section 102(b) of the ADA, 42 U.S.C. § 12112(b), provides, in pertinent part: "As used in subsection (a) of this section, the term 'discriminate' includes . . . (6) using qualification standards . . . that screen out or tend to screen out . . . a class of individuals with disabilities unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity . . . ."

Section 103(b) of the ADA, 42 U.S.C. § 12113(b), provides: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."

Section Part 1630, Appendix Section 1630.15(b) and (c) of Title 29 of the Code of Federal Regulations provides, in

pertinent part: "With regard to safety requirements that screen out or tend to screen out . . . a class of individuals with disabilities, an employer must demonstrate that the requirement . . . satisfies the 'direct threat' standard . . . in order to show that the requirement is job-related and consistent with business necessity."

Section 1630.2(n)(2) of Title 29 of the Code of Federal Regulations provides, in pertinent part: "A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function . . . ."

Section 1630.2(n)(3) of Title 29 of the Code of Federal Regulations provides:

> Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.